

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

In re ACCREDO HEALTH, INC. SECURITIES LITIGATION	) Civil Action No. 03-2216-BBD
	)
	) <u>CLASS ACTION</u>
<hr/> This Document Relates To:	)
ALL ACTIONS.	) LEAD PLAINTIFFS' MOTION <i>IN LIMINE</i> #17 TO PRECLUDE REFERENCE TO OR TESTIMONY REGARDING THE EXISTENCE OF OR ALLEGATIONS REGARDING CONFIDENTIAL WITNESSES, INCLUDING DEFENDANTS' ASSERTIONS THAT LEAD PLAINTIFFS ENGAGED IN "IMPROPER PLEADING TACTICS," "BAD FAITH CONDUCT" OR ANY SIMILAR BEHAVIOR RELATING TO CONFIDENTIAL WITNESSES
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Lead Plaintiffs, Louisiana School Employees' Retirement System and Debra Swiman (together, "Lead Plaintiffs") and the Class of investors who purchased Accredo stock between June 16, 2002 and April 7, 2003, respectfully move the Court for an order precluding Defendants from introducing evidence concerning, or making reference to, pleadings involving confidential witnesses, including the fact that none of these witnesses will be called at trial and the Defendants' baseless assertions that counsel for Lead Plaintiffs engaged in "improper pleading tactics" and "bad faith conduct" relating to confidential witnesses. *See* Lead Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 396) at 4-5 and Declaration of Trig R. Smith in Support of Plaintiffs' Opposition (Docket No. 396-3).

In their Motion for Summary Judgment, Defendants repeatedly asserted that counsel for Lead Plaintiffs engaged in "improper pleading tactics" and "bad faith conduct" relating to certain confidential witnesses who had been identified in the Complaint. *See* Defendants' Motion for Summary Judgment, Docket No. 363-2, at 1-2, 32-34. Defendants have now identified certain documents and testimony from confidential witnesses that is only relevant to the question of whether Lead Plaintiffs' pleading was accurate (it was) and are wholly unrelated to proving or disproving any of the claims against Defendants. These *ad hominem* attacks on Lead Plaintiffs' counsel will only serve as a confusing and irrelevant sideshow for the jury, just as they have been on summary judgment. Lead Plaintiffs' opposition to summary judgment and the declaration of Trig R. Smith filed therewith set forth that Defendants' personal attacks are not only contradicted by the evidence, but also completely unrelated to the appropriate legal inquiry on summary judgment. *See* Lead Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 396) at 5 and Declaration of Trig R. Smith in Support of Plaintiff's Opposition (Docket No. 396-3).

Despite the complete lack of relevance of Defendants' unfounded assertions to the merits of summary judgment, Lead Plaintiffs felt compelled to defend against these serious attacks and

submitted evidence demonstrating the propriety and thoroughness of Lead Plaintiffs' investigation, including the investigative interviews with the confidential witnesses who are the center of Defendants' attacks against Lead Plaintiffs' counsel. *Id.*

Lead Plaintiffs have informed Defendants that none of the confidential witnesses will be called at trial, nor will Lead Plaintiffs seek to admit any deposition testimony by these confidential witnesses as part of their case-in-chief. However, Defendants have signaled their intent to continue with the "sideshow" of personal attacks and have listed three of the confidential witnesses, Michelle Graham, Shari Penticuff and Joseph Worrell on their list of possible witnesses, and a smattering of related documents. None of the identified witness testimony or documents concern the alleged fraud, but rather are related only to, *inter alia*, whether the confidential witnesses recall being interviewed, whether their job titles are accurate and their communications with Lead Plaintiffs' counsel.<sup>1</sup>

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "To be relevant, evidence need have some bearing on the probability of 'the existence of any fact **that is of consequence to the determination of the action.**'"<sup>2</sup> *Black v. Ryder/P.I.E. Nationwide*, 15 F.3d 573, 587 (6th Cir. 1994) (quoting Fed. R. Evid. 401). To the extent Defendants intend to introduce evidence or refer in any way to the existence of confidential witnesses, alleged "improper pleading tactics" or purported "bad faith conduct" by Lead Plaintiffs' counsel, there can be little debate that

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<sup>1</sup> If Defendants actually identify any substantive testimony from the identified confidential witnesses that relates to Lead Plaintiffs' claims or Defendants' defenses, Lead Plaintiffs do not seek to preclude such testimony by virtue of this motion, but obviously reserve all objections to the admissibility of such testimony.

<sup>2</sup> Emphasis added.

such testimony or argument is completely irrelevant to the merits of the claims or defenses of the parties.

Even if Defendants' *ad hominem* attacks against Lead Plaintiffs' counsel could somehow be found relevant – which they cannot – such argument and testimony should nevertheless be excluded because any probative value it had would be substantially outweighed by the danger of confusion of the issues or misleading the jury. *See* Fed. R. Evid. 403. Allowing any argument or evidence on this issue to be presented by Defendants will guarantee a sideshow, wholly unrelated to the merits of the case. Given the seriousness of these accusations, Lead Plaintiffs stand ready to present witnesses and documents *in camera* that will rebut and wholly disprove Defendants' attacks. The regression of the trial into an irrelevant sideshow centered around Lead Plaintiffs' counsels' investigation, however, will constitute nothing more than a waste of time and confuse and distract the jury from the merits of the case.

Accordingly, Lead Plaintiffs respectfully request that the Court enter an Order instructing Defendants not to refer to, interrogate any witness concerning, comment on, reference, or introduce in any way evidence regarding the existence of or allegations regarding any confidential witness, including any claim that Lead Plaintiffs' counsel engaged in "improper pleading tactics," "bad faith conduct," or any similar behavior relating to confidential witnesses.

DATED: September 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 8, 2008.

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